



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2013-035

Tritech Group Ltd.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Monday, March 31, 2014*

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IN THE MATTER OF a complaint filed by Tritech Group Ltd. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

TRITECH GROUP LTD.

Complainant

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

Government Institution

DETERMINATIONS

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is valid.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services resume and complete its evaluation of Tritech Group Ltd.'s bid on the basis that, during the offer validity period, its pricing was valid for the duration of the standing offer, including any option years.

Pursuant to subsections 30.15(2) and (3) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal further recommends as follows:

- should the evaluation reveal that Tritech Group Ltd.'s bid should have been recommended for a standing offer on the basis that it was the responsive bidder with the lowest price, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services indemnify Tritech Group Ltd. for the reasonable profits that it would have made, had such circumstances been allowed to prevail;
- should the evaluation reveal that Tritech Group Ltd. had the same price as MetalBoss Technologies Inc., the Canadian International Trade Tribunal recommends that Tritech Group Ltd. be indemnified for half of its reasonable profits, on the basis that it should also have received a standing offer and half of the call-up that MetalBoss Technologies Inc. received; and
- should the evaluation reveal that Tritech Group Ltd. was non-responsive for any other reason, Tritech Group Ltd. will not be indemnified, subject to Tritech Group Ltd.'s rights to raise further grounds of objection with the Department of Public Works and Government Services or any future complaint with the Canadian International Trade Tribunal, within the time frames prescribed by section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.

If applicable, the Canadian International Trade Tribunal recommends that the Department of Public Works and Government Services and Tritech Group Ltd. negotiate an amount of compensation for reasonable lost profits. The Canadian International Trade Tribunal retains jurisdiction to recommend that amount, should any such negotiations fail.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

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STATEMENT OF REASONS

COMPLAINT

1. On January 28, 2014, Tritech Group Ltd. (Tritech) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint relates to a Request for a Standing Offer, Solicitation No. F1700-130429/A (RFSO) issued by the Department of Public Works and Government Services (PWGSC), on behalf of the Department of Fisheries and Oceans, for the fabrication and supply of two-, four- and six-unit aluminum modular buildings of various sizes.
2. Tritech alleged that PWGSC improperly disqualified its bid on the basis of a misinterpretation of its proposed pricing. Tritech's proposal was found non-responsive because PWGSC's evaluators found that "[t]he pricing was to remain valid for *one* year and your quote was only valid for 90 days"² [emphasis added]. Tritech's proposal was not further evaluated against the rated requirements of the RFSO, nor was its pricing offer considered.
3. As a remedy, Tritech requested that its proposal be considered responsive and evaluated against the applicable criteria. Tritech did not request its costs. Tritech asked that the award of the contract be postponed pursuant to subsection 30.13(3) of the *CITT Act*.
4. On January 31, 2014, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.³ On the same day, the Tribunal ordered the postponement of the award of any contract (i.e. call-ups) in relation to this solicitation until the Tribunal determined the validity of the complaint.
5. In a letter to the Tribunal dated February 5, 2014, PWGSC advised the Tribunal that the only standing offer awarded as a result of the RFSO was to MetalBoss Technologies Inc. (MetalBoss). On February 17, 2014, PWGSC notified the Tribunal that a call-up had been issued to MetalBoss on January 30, 2014, which was prior to the issuance of the Tribunal's postponement of award order. That call-up was for an amount that reached the maximum value that could be expended pursuant to the solicitation. Accordingly, because no further call-up against the standing offer was possible, the Tribunal's postponement of award order was without practical effect as of the moment of its issuance.
6. On February 25, 2014, PWGSC filed a Government Institution Report (GIR) in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁴ Tritech filed its comments on the GIR on March 11, 2014.
7. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that an oral hearing was not required and disposed of the complaint on the basis of the written information on the record.

1. R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].

2. Letter from PWGSC to Tritech dated January 8, 2014, Exhibit PR-2013-035-01 (hereinafter, regret letter).

3. S.O.R./93-602 [*Regulations*].

4. S.O.R./91-499.

PROCUREMENT PROCESS

8. The RFSO was issued on October 24, 2013. Five amendments were issued during the solicitation period. None of them are germane to this complaint. The RFSO closed on December 9, 2013, at 2 p.m., P.D.T.

9. The RFSO stated that “[o]ffers *will* remain open for acceptance for a period of not less than *ninety (90) days* from the closing date of the RFSO” [emphasis added] (the offer validity period).⁵

10. The RFSO also indicated that “Canada reserves the right *to seek an extension of the offer validity period* from all responsive offerors in writing, within a minimum of three (3) days before the end of the offer validity period” [emphasis added] (the provision for seeking an extension of the offer validity period).⁶

11. The Tribunal notes the following problem with the RFSO: the duration of the standing offer is unclear, specifically with respect to any option years.

12. The duration of the standing offer is first set out in section 1.2 of the RFSO as the “[p]eriod of the Standing Offer: 1 year with *two 1 year options*” [emphasis added] (the RFSO’s first iteration of the duration of the standing offer).

13. However, a second iteration of the duration of the standing offer is set out in section 4.1.2 of the RFSO, which provides as follows:

In completing the “Financial Table” in Annex B, offeror must provide **all** unit rates for the 2 unit, 4 unit, and 6 unit modular buildings. The quantities listed in the table are for evaluation purpose only. Failure to provide any of the unit rates will result in an incomplete submission and will not be further evaluated. These quoted rates *will* remain valid for the *period of the standing offer* including the option year [the RFSO’s second iteration of the duration of the standing offer]. . . .

[Bold and underlining in original, italics added for emphasis]

14. The internal inconsistency noted by the Tribunal between the RFSO’s first and second iteration of the duration of the standing offer is as follows: the first iteration indicates that the period of the standing offer is for one year with *two one-year options*, whereas the second iteration necessarily implies only one

5. Section 2.1 Standard Instructions, Clauses and Conditions of Part 2 – Offeror Instructions of the RFSO, incorporated by reference, and amended from 60 to 90 days, subsection 5.4 of the 2006 Standard Instructions – Request for Standing Offers – Goods or Services – Competitive Requirements (SAAC Manual), so that it read as follows for the purposes of the RFSO: “Offers *will* remain open for acceptance for a period of not less than *ninety (90) days* from the closing date of the RFSO, unless specified otherwise in the RFSO. Canada reserves the right *to seek an extension of the offer validity period* from all responsive offerors in writing, within a minimum of three (3) days before the end of the offer validity period. If the extension is accepted by all responsive offerors, Canada will continue with the evaluation of the offers. If the extension is not accepted by all responsive offerors, Canada will, at its sole discretion, either continue with the evaluation of the offers of those who have accepted the extension or cancel the RFSO” [emphasis added] (hereinafter, subsection 5.4 of the SAAC Manual as modified by the RFSO).

6. Subsection 5.4 of the SAAC Manual as modified by the RFSO: “Canada reserves the right *to seek an extension of the offer validity period* from all responsive offerors in writing, within a minimum of three (3) days before the end of the offer validity period. If the extension is accepted by all responsive offerors, Canada will continue with the evaluation of the offers. If the extension is not accepted by all responsive offerors, Canada will, at its sole discretion, either continue with the evaluation of the offers of those who have accepted the extension or cancel the RFSO” [emphasis added].

possible option year (“*the* option year”, in the singular). PWGSC’s evaluators appear to have viewed the duration of the standing offer as comprising *no* option year at all because the regret letter omitted any reference whatsoever to an option year (or to option years, in the plural), stating instead that “[t]he pricing was to remain valid for *one* year and your quote was only valid for 90 days” [emphasis added].⁷

15. Five offers⁸ were submitted: one by Tritech (found non-compliant for the reason indicated above); another by MetalBoss (ultimately the responsive bidder with the lowest evaluated price);⁹ another by an unnamed responsive bidder whose evaluated price was higher than that of MetalBoss; and two others, each by unnamed non-responsive bidders.

16. The evaluation of the offers, and ultimately the acceptance of MetalBoss’s offer, therefore took place at a certain time between December 9, 2013 (bid closing date) and January 14, 2014 (bid award date), the date on which PWGSC awarded the standing offer to MetalBoss.

17. Accordingly, 36 calendar days separate the bid closing date from the bid award date; bids were evaluated, and MetalBoss’ offer accepted, during the offer validity period.

ISSUE AND POSITIONS OF PARTIES

18. The sole ground of complaint in this matter centres on PWGSC’s interpretation of two sentences contained in Tritech’s proposal. Those sentences appear under the filled-out table of Annex B, “Basis of Payment”, that it provided in its proposal. The issue arose not in respect of the table itself where Tritech claims to have given firm pricing for the duration of the standing offer (one year and any option periods) but rather in respect of the two sentences that follow that table that read as follows: “Material pricing is valid for 90 days. After 90 days the material pricing component of the bid will be indexed to North American published Aluminum price indices [the impugned sentences of Tritech’s bid].”

19. The regret letter stated that PWGSC’s motive for non-compliance was because “[t]he pricing was to remain valid for *one* year and your quote was only valid for 90 days” [emphasis added].

20. In the GIR, PWGSC added that the evaluators determined that Tritech’s bid was non-compliant in respect of the financial evaluation requirements of the RFSO on the basis that they read the impugned sentences of Tritech’s bid as having “. . . modified the terms and conditions of the RFSO . . .”, by including a “condition” and the “. . . unknown variable pricing factor (based on future fluctuations of North American aluminum price indices) . . .”¹⁰

21. Tritech’s position in response to PWGSC’s regret letter, as submitted in its complaint, was as follows:

Our intention was to show that we are willing to hold our price for the term requested with 90 days being the “acceptance period” [i.e. the offer validity period] not the validity period [i.e. one or the other of the first or second iterations of the duration of the standing offer]. After 90 days in the event of a force majeure or a drastic price change in Aluminium prices we would need some sort of

7. See regret letter.

8. Exhibit PR-2013-035-10 at paras. 14, 18, at 7-8. The Tribunal notes that the GIR paragraph numbering begins three times at paragraph 1, i.e. at each of pages 4, 10 and 15 of the GIR. Accordingly, to allay confusion, both paragraph and page references are given with respect to citations concerning the GIR in all instances.

9. According to section 4.2.1 of the RFSO, “[t]he responsive bid with the lowest evaluated price [would] be recommended for award of a contract.”

10. Exhibit PR-2013-035-10 at paras. 4-5, at 4-5.

medium to compare to and the North American Aluminium price indices is commonly used for a fair indicator. We were prompted to show a fair medium by reading the following section in the Tender. 6A4.2 states “If the standing offer is authorized for use beyond the initial period, the offeror offers to extend its offer for an additional two (2) one (1) year periods under the same conditions and at the rates or prices specified in the standing offer, or at the rates or prices calculated in accordance with the formula specified in the standing offer.”

We presumed that the use of a formula in the standing offer would mean that some sort of medium would be used to analyse any drastic changes in material prices. This is the reason we suggested the North American price indices in our proposal.¹¹

22. The foregoing was essentially reiterated by Trittech in its comments on the GIR:

... Our offer complied with “acceptance period of 90 days” as requested in the RFSO [i.e. the offer validity period]. Our statement “material pricing is valid for 90 days. After 90 days the material pricing component of the bid will be indexed to the North American published Aluminum price indices” was intended to address Standard Instruction for RFSO Item 05 (2013-06-01) Submission of Offers clause 4, to address the extension of the 90 day validity period [i.e. the provision for seeking an extension of the offer validity period]. Upon acceptance of our offer within 90 days, we had committed to the terms and conditions of the RFSO and our prices would remain valid for the period of the standing offer including the option period [i.e. one or the other of the first or second iterations of the duration of the standing offer]. PWGSC completely misinterpreted our statement.¹²

23. PWGSC argued that the views provided by Trittech in the two preceding paragraphs constitute new information that was not contained in Trittech’s offer and that Trittech should have sought clarification.¹³

ANALYSIS

24. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. At the conclusion of the inquiry, the Tribunal must determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements. All the trade agreements identified in paragraph 7(1)(c) of the *Regulations* apply to this solicitation.

25. Article 506(6) of the *Agreement on Internal Trade*¹⁴ reads as follows:

... The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

26. Article 1015(4) of the *North American Free Trade Agreement*¹⁵ reads as follows:

11. Exhibit PR-2013-035-01 at 8 (Procurement Complaint Form – Question 5F – Detailed Statement of Facts and Arguments).

12. Exhibit PR-2013-035-14, p. 2.

13. Exhibit PR-2013-035-10 at paras. 17-20, at 13-14.

14. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [AIT]. The Tribunal has recognized that this article of the *AIT* encompasses the obligation that the procuring entity use the announced criteria in evaluating proposals. See, for example, *C3 Polymeric Limited v. National Gallery of Canada* (14 February 2013), PR-2012-020 (CITT) at para. 27; *AmeriData Canada Ltd.* (9 February 1996), PR-95-011 (CITT).

4. An entity shall award contracts in accordance with the following:
 - (a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;
 - ...
 - (d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation

27. According to PWGSC's position, Trittech was proposing unit prices that would have been valid for only the first 90 days of any awarded standing offer; after that moment, its unit prices would have been modified in accordance with any then prevailing aluminum market prices.¹⁶ That position is not reasonable for the reasons that follow.

28. It is well established, and was recently reiterated, that the Tribunal is reluctant to substitute its judgment for those of evaluators, save in very specific circumstances.¹⁷ The facts in this matter gave rise to such circumstances, and the Tribunal's intervention is therefore warranted.

29. This matter illustrates problems that can arise when bidders or evaluators make assumptions or presumptions.

30. As a general rule, bidders should not make assumptions or presumptions. PWGSC correctly indicated (and Trittech admitted as much) that Trittech presumed that it could include in its bid a formula so that "[a]fter [the expiry of the] 90 days [of the offer validity period] the material pricing component of the bid will be indexed to the North American published Aluminum price indices".

31. In Trittech's mind, it provided unit prices that were valid for the duration of the offer validity period, and, if its bid were accepted, it would be bound by those prices for the duration of the standing offer. The impugned sentences of Trittech's bid contain no conditional language. By including the phrase to the effect that "[a]fter 90 days the material pricing component of the bid will be indexed to the North American published Aluminum price indices," it believed that it was indicating that its bid could be amended to take into account possible changes in any aluminum costs, *if and only if* PWGSC asked bidders if they agreed to extend the offer validity period through the provision for seeking an extension of the offer validity period.

32. In other words, Trittech was giving notice that it would not entertain an extension of the offer validity period beyond its 90-day expiry date, unless it was allowed to review the "material pricing component of the bid". PWGSC's position is unreasonable because it fails to understand the commercial reality that a bidder, namely, Trittech, could reasonably have wanted to submit proposals for the offer validity period and state, at the same time, that it would want an opportunity to review that position if it were asked to extend the offer validity period (i.e. guaranteeing for 90 days unit prices for a period of a year is one thing; guaranteeing such prices beyond 90 days is another).

15. *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [NAFTA]. The other trade agreements contain provisions similar to those of NAFTA

16. Exhibit PR-2013-035-10 at para. 5, at 11.

17. See *Saskatchewan Institute of Applied Science and Technology v. Department of Foreign Affairs, Trade and Development* (9 January 2014), PR-2013-013 (CITT) at paras. 58-59.

33. To be clear, Trittech's proposal contained no "material pricing component". All that it contained was firm unit prices open for acceptance during the offer validity period. As such, Trittech complied with the requirements of the RFSO. For that reason, and contrary to what was argued by PWGSC, this matter is fully distinguishable from the precedents cited by PWGSC.¹⁸

34. The RFSO gave notice that "... quoted rates *will* remain valid for the period of the standing offer including the option year ..." [emphasis added]. The only "rates" found in the RFSO, and in Trittech's bid, are the "unit rates" of the table of Annex B. Accordingly, as soon as Trittech submitted a bid that quoted unit rates in the column provided to that effect in Annex B, Trittech became bound by such unit rates.

35. Put otherwise, and to view this matter from the perspective of reversing the positions of the parties, had PWGSC accepted Trittech's bid, and compelled Trittech to sign a standing offer, as PWGSC would have been in right to do, Trittech could *not* have argued that PWGSC had accepted a bid that provided for a given price for the first 90 days of a standing offer and an indexed price thereafter. PWGSC would have been right in insisting that the 90 days referred to in the impugned sentences of Trittech's bid could only necessarily refer to the offer validity period. PWGSC would have also been right to argue that Trittech had agreed that "... quoted rates *will* remain valid for the period of the standing offer including the option year ...", that the only "rates" found in the RFSO, and in Trittech's bid, are the "unit rates" of the table of Annex B and that the impugned sentences of Trittech's bid are not applicable in respect of the bound quoted "unit rates" because those sentences refer to a "material pricing component" that is nowhere to be found, in either the RFSO or Trittech's bid.

36. But assuredly, Trittech gave notice that it would not extend its bid past the offer validity period without the opportunity to adjust its bid in relation to future prevailing aluminum prices. Trittech's error of presumption was that it assumed that it was appropriate to include in its bid a formula that proposed a method of changing its bid in the event that PWGSC engaged the provision for seeking an extension of the offer validity period. That presumption finds no basis in the RFSO; the only "formula" found in the RFSO is the one identified by PWGSC whereby unit prices are multiplied by the number of units of each type of identified modular building. As such, Trittech's assumption was an unreasonable assumption.

37. Nonetheless, that should not have been fatal to its bid because it had no effect on its unit prices during the offer validity period or during either of the iterations of the duration of the standing offer and, therefore, was irrelevant for the purposes of ascertaining compliance. Of course, Trittech's assumption muddied the waters because it was the source of the equally unreasonable assumption made by PWGSC's evaluators – one that is fatal to PWGSC's position in this complaint.

38. This gives the opportunity to state that, as a general rule, evaluators should not make assumptions either.

18. In support of its position, PWGSC cited *DDI Group Ltd.* (24 November 2008), PR-2008-036 (CITT) [*DDI Group*], and *Winchester Division-Olin Corporation v. Department of Public Works and Government Services* (2 April 2004), PR-2003-064 (CITT) [*Winchester*]. However, in *DDI Group*, instead of providing ceiling prices in accordance with the solicitation, the bidder had added a fuel surcharge that deviated from the mandatory pricing schedule; the surcharge proposed by the bidder was to change relative to the cost of fuel and was listed as being "negotiable" when the cost of fuel was at or above a certain level. In *Winchester*, the bidder in that matter expressly included a condition of delivery (that it would be able to obtain licences) and defended the reasons why one necessarily had to be included. Neither of these cases supports the position taken by PWGSC in this matter.

39. The evaluators' reading of Trittech's bid is unreasonable because it assumed that an eventual indexing of the "material pricing component" of its bid could only mean that it was proposing to modify its unit price accordingly after the first 90 days of an awarded standing offer. Yet, there was perfect correspondence between the 90-day period expressed in Trittech's bid and what the RFSO had requested as the offer validity period. Could it not have been ascertained, quite easily, that Trittech's intention was something other than what PWGSC decided to assume? How? PWGSC could simply have asked Trittech to clarify what it meant by the impugned sentences of Trittech's bid instead of jumping to conclusions.¹⁹

40. PWGSC's position is unreasonable because it was based on an absence of even the slightest attempt by its evaluators to probe the meaning of the impugned sentences of Trittech's bid so as to consider an intention other than what they decided to assume. No alternative to the evaluators' viewpoint appears to have been considered, nor explored, in the least. As such, the evaluators chose to abdicate their responsibility to consider the intention of what was expressed in Trittech's bid in favour of what appears to be nothing other than a knee-jerk reaction on their part; the bid said something out of the ordinary so it must necessarily have meant that Trittech's pricing is something other than what had been asked for.

41. The RFSO contained a clause to the effect that PWGSC could seek clarification but was under no obligation to do so. PWGSC should have exercised its prerogative to seek clarification of what Trittech had intended to express through the impugned sentences of Trittech's bid. Had it done so, it would have avoided making an assumption, in favour of seeking the true intention of what Trittech stated in its bid. This illustrates that assumptions, such as those made by the PWGSC in this instance, can be just as fatal to the reasonableness of a government institution's evaluation as those made by bidders in the preparation of their bids.

42. Bidders can and should avail themselves of their prerogative to pose questions and expect answers from government institutions so as to challenge their assumptions. Government institutions can avail themselves of their prerogative to seek clarification from bidders so as to challenge theirs. They should not hesitate to do so because assumptions can remove their evaluations from the realm of the reasonable, such as in the present instance.

43. Accordingly, the Tribunal is justified in substituting its judgment for that of the evaluators in this instance because the assumption that they made shows their failure to apply themselves in evaluating Trittech's proposal, the willful ignorance of vital information that it contained and/or the reading of an intention that it did not reasonably contain.

44. For the foregoing reasons, the Tribunal finds that Trittech's proposal should not have been found non-responsive for the reason invoked by PWGSC. Accordingly, the Tribunal finds that the complaint is valid.

REMEDY

45. In accordance with the criteria set out in subsection 30.15(3) of the *CITT Act*, the Tribunal finds that the deficiency identified above is serious and prejudicial to the integrity and efficiency of the competitive procurement system, particularly given the fact that there were only five bidders and that a call-up for the maximum amount of the solicitation has already been awarded. The extent to which that call-up has been performed is unknown. The record appears to indicate that Trittech presented the most attractive financial

19. PWGSC did as much in *Winchester*.

proposal (i.e. the lowest bid).²⁰ Yet, the Tribunal cannot presume the outcome of a proper evaluation of Tritech's proposal.

46. Accordingly, the Tribunal directs PWGSC to pursue its evaluation of Tritech's bid on the basis that, during the offer validity period, its pricing was valid for the duration of the standing offer, including any option years (one year, and one or two option years depending on which of the RFSO's two iterations of the duration of the standing offer is correct).

47. The Tribunal's determinations below recommend remedies according to the outcome of the evaluation and indemnification of Tritech for lost reasonable profits, should it be entitled to any.

COSTS

48. Tritech did not request costs, therefore none are granted.

DETERMINATIONS OF THE TRIBUNAL

49. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is valid.

50. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal recommends that PWGSC resume and complete its evaluation of Tritech's bid on the basis that, during the offer validity period, its pricing was valid for the duration of the standing offer, including any option years.

51. Pursuant to subsections 30.15(2) and (3) of the *CITT Act*, the Tribunal further recommends as follows:

- should the evaluation reveal that Tritech's bid should have been recommended for a standing offer on the basis that it was the responsive bidder with the lowest price, the Tribunal recommends that PWGSC indemnify Tritech for the reasonable profits that it would have made, had such circumstances been allowed to prevail;
- should the evaluation reveal that Tritech had the same price as MetalBoss, the Tribunal recommends that Tritech be indemnified for half of its reasonable profits, on the basis that it should also have received a standing offer and half of the call-up that MetalBoss received; and
- should the evaluation reveal that Tritech was non-responsive for any other reason, Tritech will not be indemnified, subject to Tritech's rights to raise further grounds of objection with PWGSC or any future complaint with the Tribunal, within the time frames prescribed by section 6 of the *Regulations*.

52. If applicable, the Tribunal recommends that PWGSC and Tritech negotiate an amount of compensation for reasonable lost profits. The Tribunal retains jurisdiction to recommend that amount, should any such negotiations fail.

Serge Fréchette
Serge Fréchette
Presiding Member

20. The record before the Tribunal does not however allow the Tribunal to pronounce on the validity of Tritech's allegation in that respect.